INDEX.

Subject Index.

	Page
Preliminary statement	1
Argument	1
I. Is the decree at Chicago binding upon non-resident shareholders who neither were served nor entered their appearance therein?	1
1. The doctrine of virtual representation is restricted to those cases where	2
a. There is jurisdiction by the Court rendering the decree over the persons of the non-resident shareholders by the entry of appearance, or	2
b. The shareholders have agreed by virtue of statutory provision that they shall be bound by a decree although not within the jurisdiction of the Court	2, 3
c. There are no statutory or constitutional provisions imposing such an agreement on the shareholders here	2, 3
d. Petitioner's position is alternative that either the Chicago decree is not effective against non-resident shareholders or the Ohio Bill should be dismissed for other reasons	4
II. Petitioner's are being deprived of their constitutional right of trial by jury since the action of the respondents should be at law, not in equity	5
1. No equitable administration of a fund in the case at bar is either necessary or proper in the District Court in Ohio	6
a. The District Court at Chicago assumed jurisdiction over the res by providing appropriate machinery for the equitable administration of all funds	6
Provisions of the Chicago decree	6
b. The Ohio District Court has exercised its sound discretion against the partial administration of this fund in Ohio	7
2. Class suits may be brought at law in United States District Courts in Ohio	7
Ohio General Code, Section 11257	7
The Federal Conformity Act, Section 724, Title 28 U. S. C. A.	8
3. The Conformity Act and Judicial Code, Section 267, not the State statute, deprive the equity side of the Federal court of jurisdiction	8
4. Right of trial by jury inviolate	9

Page

III. The bill is multifarious due to the misjoinder of parties defendant 10
1. Petitioners' obligations to creditors are individual, separate and distinct 10, 11
a. Joinder of these shareholders is improper ... 11
2. The District Court in Ohio exercised its discretion dismissing the bill as multifarious 11
a. This discretion should not be lightly overruled 11
3. The rule governing multiplicity also covers multifariousness 11, 12
IV. The bill should be dismissed as to one hundred twenty-nine (129) shareholders, each of whom appears on the face of the bill, to be liable for less than $3,000.00 12
1. Defendants' claims cannot be aggregated for jurisdictional purposes 12
2. The bill should be dismissed as to all defendants except Western Securities Company for want of jurisdictional amount 12
a. Western Securities Company only defendant holding sufficient number of shares at $5.00 par to equal jurisdictional amount 12
3. The par value of the shares is fixed by statute at $5.00 ..... 12, 13
4. The attempted issue of par value shares in excess of $5.00 was ultra vires 14
a. Estoppel claimed by respondents against petitioners has no application in cases of ultra vires corporate acts 14
V. The bill should be dismissed as to defendant executors and administrators for failure to allege that the claim was presented for allowance or rejection in accordance with the General Code Ohio 14
1. This provision is a condition precedent, not a statutory limitation 15
Conclusion 16

TABLE OF AUTHORITIES CITED.

Court Decisions.

Alabama v. *Arizona*, 296 U. S. 291 11
Awoten v. *Atlas Exchange National Bank*, 295 U. S. 209 14
Angelo American Land Co. v. *Lombard*, 132 Fed. 721 14
Bernheimer v. *Converse*, 206 U. S. 516 2
Broderick v. *American General Corp.*, 71 F. (2d) 864 12
Brown v. *Guaranty Trust and Safe Deposit Co.*, 148 U. S. 403, 410 11
California Bank v. *Kennedy*, 167 U. S. 362 14
Central Transportation Co. v. *Pullman*, 139 U. S. 24 14
Citizens Bank v. *Cannon*, 164 U. S. 362 12
Converse v. *Ætna National Bank*, 79 Conn. 163, 64 At. 345 3

	Page
Converse v. *Steward*, 94 N. Y. Sup. 310	3
Di Giovanni v. *Camden Fire Ins. Co.*, 296 U. S. 64, 70	12
Evans v. *Nellis*, 187 U. S. 271	4
Georgia v. *Chattanooga*, 264 U. S. 472	8
Hale v. *Allinson*, 188 U. S. 56	4, 12
Henrietta Mills v. *Rutherford County*, 281 U. S. 120	8
Holmberg v. *Carr*, 86 Fed. (2d) 727	3
Howarth v. *Angle*, 162 N. Y. 179, 56 N. E. 489	3
Hunt v. *Whewell*, 122 Wis. 33	3
Kelly v. *Gill*, 245 U. S. 116	10, 11
Lamar Ins. Co. v. *Hildreth*, 55 Iowa 248	3
Leman v. *MacLenan*, 7 O. C. C. (N. S.) 250 (Aff'd 75 O. S. 643)	3
Marion v. *Sneeden*, 291 U. S. 262	14
Marshall v. *Sherman*, 188 N. Y. 9, 24	3
Matthews v. *Rogers*, 284 U. S. 521	8
McCormick v. *Market Bank*, 165 U. S. 537	14
Platt v. *Colvin*, 50 O. S. 702, 712, 713	7
Sovereign v. *O'Neill*, 266 U. S. 292	12
Texas & Pacific Railroad Co. v. *Potterf*, 291 U. S. 245	14
Union Pacific Railroad v. *Board of Commissioners*, 222 Fed. 651	9
United Copper Securities Co. v. *Amalgamated Copper Co.*, 232 Fed. 574	8

STATUTES CITED.

U. S. C. A., Title 12, Section 674	12
U. S. C. A., Title 12, Section 692	13
U. S. C. A., Title 12, Section 811	12
U. S. C. A., Title 12, Section 812	13
U. S. C. A., Title 12, Section 813	13
U. S. C. A., Title 28, Section 384	8, 9
U. S. C. A., Title 28, Section 724	8
Ohio General Code, Section 11257	7
Ohio General Code, Section 10509-112	15

MISCELLANEOUS CITATIONS.

Yale Law Journal, Volume 17, page 457	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

Petitioners,

vs.

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

REPLY BRIEF FOR PETITIONERS.

Petitioners file this reply brief in order to clarify their position following the respondents' brief. The points made herein by the petitioners are outlined in the subject index, to which reference is here made.

I.

Is the Decree at Chicago Binding Upon Non-Resident Share-holders Who Neither Were Served Nor Entered Their Appearance Therein?

Respondents aver in their Bill (R. 5) in the Ohio case that the Chicago decree

> "• • • effectively adjudicates against the Defendants herein that all of the stockholders of the Bank

> *are liable* to the creditors of the Bank for an assessment equal to 100% of the par value of the shares held by them respectively."

The decree does levy an assessment

> "upon all of the stockholders of the Chicago Joint Stock Land Bank and each and every one of them * * * in the amount of 100% of the par value of the stock so held by each stockholder on the 1st day of October, 1932" (R. 28).

The averment that the Chicago decree adjudicates the liability of the defendants herein is based upon the theory that all non-resident shareholders are bound by the Chicago decree through the doctrine of virtual representation. By the application of that doctrine, respondents seek to deprive petitioners of any hearing in Court upon questions vital to many and disastrous to others.

The doctrine of virtual representation applied to a corporation and its stockholders is of long standing. The true rule is that the corporation, when properly in Court, represents all of its shareholders in matters which directly affect the corporation and which indirectly affect the shareholders' equity therein. No finding of a Court can create a personal liability upon any person not within the jurisdiction of the Court. Respondents seek to make effective against non-resident shareholders the decree of the Chicago Court imposing a direct liability upon the shareholders as a class. The authorities extending the doctrine of virtual representation to such an instance are based upon the assumption that the shareholder at the time of making his contract agrees that such finding shall constitute liability upon him because of the provisions of the applicable Constitutions or Statutes of the States. See

Bernheimer v. Converse, 206 U. S. 516.

In the case at bar, the statutes of Illinois and of the United States are devoid of any provisions upon which an agreement to be bound may be attached to the shareholders.

Respondents' view is that the decree at Chicago is not a personal judgment against the shareholders individually. The Chicago decree is tantamount to a judgment against the shareholders as a class and attempts to create a personal liability upon the shareholders as a class and against each and every shareholder in that class. It is difficult by judicial refinement to distinguish a finding of personal liability of shareholders as a class, as well as against each and every individual of that class, and a personal judgment against the individuals, which leaves open only the question of whether or not the individual is a shareholder. The levying of an assessment is just as much an imposition of liability on the shareholders as a class as the levying of a tax or the imposition of a specific lien by the levying of execution. True, the liability imposed is not in the nature of a personal judgment against any named individual, but does impose the liability against each and every stockholder. The liability of the shareholders and each of them as a class is made absolute. Especially would the application of the doctrine of virtual representation be harsh in double liability cases, because the finding is that the stockholders are liable, not to the Bank, but to the creditors of the Bank, the payment of which liability does not directly affect the Bank. Surely, a fine thread upon which to hang the disregard of the rights of an individual to his day in court!

Some courts have refused to recognize such a star chamber proceeding.

Lamar Ins. Co. v. *Hildreth,* 55 Iowa 248;
Converse v. *Steward,* 94 N. Y. Sup. 310;
Howorth v. *Angle,* 162 N. Y. 179, 56 N. E. 489;
Marshall v. *Sherman,* 188 N. Y. 9, 24;
Hunt v. *Whewell,* 122 Wisc. 33;
Leman v. *MacLenan,* 7 O. C. C. (N. S.) 250 (Aff'd 75 O. S. 643);
Converse v. *Ætna Nat'l Bank,* 79 Conn. 163, 64 Atl. 340;
Holmberg et al. v. *Carr,* 86 F. (2d) 727.

The Supreme Court of the United States doubted, without deciding, the applicability of the doctrine.

Hale v. *Allinson*, 188 U. S. 56;
Evans v. *Nellis*, 187 U. S. 271.

See also *Yale Law Journal*, Vol. 17, Page 457, wherein this question is discussed. The author there commented:

> "Accordingly, the United States Supreme Court held in *Hale* v. *Allinson* that the proceedings were not binding upon any who were not served, or made voluntary appearance, and the statute thus proved abortive as to non-resident stockholders."

Respondents' brief, page 20, criticises petitioners because they contended in the District Court that the bill should be dismissed on the ground that the Chicago decree is not effective as against non-resident shareholders, and at the same time opposed an amendment which respondents were seeking to file below alleging insolvency. Our position in the District Court, the Court of Appeals and here is the same, to wit, the decree is not effective against non-resident shareholders; *but in the alternative*, should the Court hold the Chicago decree to be binding on the absentee shareholders, the bill should be dismissed for other reasons. The inconsistency, if there be one, is upon the respondents. They take no alternative position, but claim the Chicago decree is binding and at the same time offer an amendment pleading insolvency, which allegation they themselves contend is neither pertinent nor proper. We objected to the amendment for the reason that it was completely changing their cause of action.

There is no Act of Congress and no State constitutional or statutory provision imposing upon the shareholders of the Chicago Joint Stock Land Bank an agreement (which agreement is the basis for the application of the doctrine of virtual representation) to make the Chicago Court decree

binding upon non-resident shareholders who are not subject to the jurisdiction of that Court; in such case, the doctrine of virtual representation has no application and the bill should be dismissed for the following reasons:

1. There is no allegation in the Bill in Equity that the corporation is insolvent;

2. There is no allegation of the necessity of an assessment against shareholders;

3. The Bank is not a party to the proceedings in the case at bar.

II.

Petitioners are Being Unlawfully Deprived of Their Constitutional Right of Trial by Jury. The Action of the Respondents Should be at Law, Not in Equity.

The above statement becomes necessary for consideration of the Court only in the event the Court should find the Chicago decree to be binding upon absentee stockholders. Petitioners cited a number of cases in their original brief sustaining this position. Respondents, however, contend that those cases are not applicable to the case at bar for two reasons: (1st) in those cases no trust fund was sought to be administered; and (2nd) none of those cases involved a class suit, which is cognizable in equity.

Mere administration of a trust fund does not generate equitable jurisdiction. To entitle respondents to maintain their suit in equity, the Court must be required necessarily to exercise some equitable power in the administration of the fund. A trust fund may be ordered paid over to either an individual or a class of individuals without the exercise of any equitable powers. This can be done on the law side of the Court.

No Equitable Administration of the Fund in the Case at Bar is Either Necessary or Proper in the Ohio Court.

The Court at Chicago has set up appropriate machinery for the equitable administration of all funds derived from the shareholders. It has thus assumed jurisdiction over the *res*. By its decree (R. 38), the receiver is required to publish notice once each week for four successive weeks in the Chicago Daily Law Bulletin

> "to the effect that *all* persons having claims as creditors of the Chicago Joint Stock Land Bank shall be permitted to file their intervening petitions in this proceeding * * * and to make proof of their claims before the Receiver herein, failing to do which, such creditors shall have no claim against the fund collected herein."

The Receiver (R. 39) was further

> "authorized to collect *from any or all of the stockholders* of said Bank the assessments hereby levied against such stockholders, whether such stockholders be parties to this suit or not, and whether such stockholders be residents of Illinois, or reside elsewhere. And upon payment in full of any such assessments to the Receiver herein, such Receiver is hereby authorized to give full discharge and acquittance to any stockholder thus making payment."

The decree further provides (R. 39):

> "12. It is further ordered, adjudged and decreed that the Court reserves jurisdiction as to all questions which may arise concerning the validity of claims filed herein by intervenors concerning the application and distribution of moneys collected by the Receiver herein * * *."

All funds recovered through the Federal Court in Ohio may be ordered transmitted to the Receiver in Chicago. This does not constitute equitable administration of a trust

fund. Respondents would have Federal District Courts in the forty-eight States and State courts in which actions were brought by creditors each equitably administering the fund, with a possible result of variable determinations in as many courts in which the actions may be brought. The facts necessary to determine the equal and ratable distribution to the creditors should be determined by one Court. Each creditor's proportion to the whole may be determined to be different in each proceeding. The enormous expense to the creditors and the stockholders to have such separate and distinct administrations of the fund in many Districts and the necessity for the creditors to file their claims in every jurisdiction would be burdensome, to say the least. The congeries of diverse decisions which may result could easily be obviated by the mere mailing of checks to the receiver at Chicago. Under these circumstances, the Ohio Court should not assume an equitable administration of that fund, but should transmit the same upon recovery.

The sound discretion of the Ohio Court has been exercised against the administration of this fund (R. 61). Such sound discretion should not be disturbed upon respondents' desire to have a separate administration of that part of the fund collected in Ohio.

These respondents were the complainants in the Chicago case. (Reply Brief of the Respondents, Page 2.) Certainly, these respondents should not be permitted in this Court to deny their own Chicago decree.

Respondents contend, however, that the bill in equity should be entertained for the further reason that this is a class suit, that class suits were cognizable in the English courts of Chancery prior to 1789 and therefore recognized by the Federal courts. As stated in our Original Brief, *Section 11257 of the General Code of Ohio* permits class suits to be brought on the law side of the Court.

Platt v. *Colvin*, 50 O. S. 702, 712, 713.

The Conformity Section of the Federal Statutes (*Section 724 of Title 28, U. S. C. A.*) permits in the Southern District of Ohio such an action to be brought on the law side of the Court. *Section 384 of Title 28, U. S. C. A.* denies to the Federal Court equitable jurisdiction where there is a plain, adequate and complete remedy at law.

Respondents invoke the general rule that State Statutes can not enlarge or diminish the equity jurisdiction of the Federal Court in such cases wherein the equity court had such equitable jurisdiction prior to 1789. This rule has no application to the case at bar. Double liability on stockholders of Joint Stock Land Banks was not in existence in 1789, but came into existence in recent years and long after the Statute in Ohio had been passed authorizing class actions in Courts at law. The fact that prior to 1789 the Chancery Court may or may not have had general jurisdiction of class actions is not the test. This question comes within the rule invoked in the following cases:

United Copper Securities Co. v. *Amalgamated Copper Co.*, 232 Fed. 574;
Matthews et al. v. *Rodgers*, 284 U. S. 521;
Henrietta Mills v. *Rutherford County*, 281 U. S. 120;
Georgia v. *Chattanooga*, 264 U. S. 472.

In each of these cases a State statute was directly applied to oust Federal equity jurisdiction. Injunctions were sought against the collections of tax, the State enacted statutes giving adequate remedy at law. The State statute created a legal remedy at law, which by the Conformity statute of the United States provided an adequate remedy on the law side of the Federal court. In the case at bar, our State statute provides a comparable right to proceed at law in the Federal court. Injunction as an equitable right existed prior to 1789, the same as an equitable class action existed prior to 1789. But the injunction in the

above named cases did not lie to the collection of this particular tax because the tax did not exist, just as in the case at bar a class suit did not lie in this particular type of case because the statutory liability did not exist.

A class action is cognizable in equity only because there is no plain and adequate remedy at law. A class action does not necessarily involve any other equitable jurisdiction. When equitable jurisdiction is sought merely on the ground of inadequacy of the remedy at law, the general rule invoked above that State statutes can not enlarge or diminish the equity jurisdiction of Federal courts has no application. See concurring opinion of Judge Hook in

Union Pacific R. R. v. *Board of Commissioners* (8th C. C. A.) 222 Fed. 651.

The reason for this exception to the general rule is apparent. Courts will not so lightly set aside a constitutional right of trial by jury, a Congressional Act that no suit shall be maintained in equity where there is a plain and adequate remedy at law, and the Conformity Section of the Act of Congress on such a technicality. *Section 384 of Title 28, U. S. C. A.* has been in force and effect as long as the statutes granting jurisdiction to Federal courts, and is certainly entitled to the same legal respect as the statute granting equitable jurisdiction. To say that such statute shall not be effective as against a State enactment wherein equity jurisdiction is assumed merely because there is no adequate remedy at law, and no equitable rights other than that are properly sought to be enforced, would be an anomaly. Especially would such a rule be obnoxious in cases in which the right of trial by jury, so carefully guarded in the Constitution, was being disregarded.

Inasmuch as there is no equitable administration of a trust fund in this Court either necessary or proper under the facts as revealed in this Record, and inasmuch as the re-

spondents have a complete and adequate remedy at law, this Bill has no equity, but comes directly within the reasoning of

Hale v. *Allinson*, 188 U. S. *supra*.

See also *Kelly* v. *Gill*, 245 U. S. 116.

Respondents attempt to distinguish *Hale* v. *Allinson*, *supra*, and the other cases cited in our Brief by stating that in *Hale* v. *Allinson* no trust fund is sought to be administered. That statement is true. No trust fund is properly sought to be administered in the case at bar. The administration of the trust fund being out of the case, there is no distinction between *Hale* v. *Allinson* and the present case. The cases relied upon by respondents wherein the Court holds equitable jurisdiction to be properly involved are those in which the equitable administration of a fund is not only proper but necessary.

III.

The Bill is Multifarious Due to Misjoinder of Parties Defendant.

Respondents claim there is no misjoinder, citing the *Cago* and the *Conway* cases. Both of these cases allege the insolvency of the Bank and seek the equitable administration of a fund. The amount of the assessment and the declaration of the necessity thereof were necessary in both those cases. They may be classed as primary suits. Having properly obtained the jurisdiction in both of those cases of the shareholders who were proper, if not necessary, parties to determine the insolvency of the corporation and to declare the necessity for an assessment, the Court retained jurisdiction to completely adjudicate all issues before it. We have no such situation in this case. The shareholders each have a separate and distinct obligation

to the creditors, assumed by virtue of independent contracts, none of which has any relation to the other, and no issue with the creditors is common to the shareholders. The claimed liability of the shareholders to the creditors is individual, made so specifically by the Statute. In such cases, there can be no joinder of shareholders.

See

Kelly v. *Gill*, 245 U. S. 116,

which involved the collection of individual subscriptions of shareholders.

Whether or not a bill is multifarious due to misjoinder of defendants is within the sound discretion of the Court.

See

Alabama v. *Arizona*, 296 U. S. 291;

Brown v. *Guaranty Trust and S. & D. Co.*, 148 U. S. 403, 410.

The District Court properly exercised its sound discretion in this matter. The District Court must have taken into consideration the various factors necessary to the exercise of that discretion. It must have considered the separate and distinct nature of the defenses, the individual contracts of purchase of shares, the individuality of the liability and, above all, the conveniences and inconveniences to the shareholders and the creditors, the hardships or benefits to the creditors and the shareholders, and all other pertinent factors. This discretion should not be lightly overruled. The same factors in determining the sound discretion of the Court in misjoinder are taken into consideration when the Court exercises its discretion as to the assumption of Federal equity jurisdiction on the ground of multiplicity of suits.

Alabama v. *Arizona*, 296 U. S. 286, in determining there was a misjoinder of parties defendant, cited the case of

Hale v. *Allinson*, 188 U. S. 56 (a case involving multiplicity of suits), as controlling in the matter of misjoinder of parties. *Hale* v. *Allinson* is the law of the United States today. It is quoted with approval in the case of *Di Giovanni* v. *Camden Fire Insurance Co.*, 296 U. S. 64, at page 70. The bill should be dismissed for misjoinder of the defendants.

IV.

The Bill Should be Dismissed as to One Hundred Twenty-Nine (129) Shareholders, Each of Whom Appears in the Face of the Bill to be Liable for Less Than Three Thousand Dollars ($3,000.00).

The claims of the defendants in an action of this type can not be aggregated for the purpose of acquiring jurisdiction. This is definitely determined in the following cases:

Di Giovanni v. *Camden Fire Insurance Co.*, 296 U. S. 64;
Sovereign v. *O'Neill*, 266 U. S. 292;
Hale v. *Allinson*, 188 U. S. 56;
Broderick v. *American General Corp.*, 71 F. (2d) 864;
Citizens Bank v. *Cannon*, 164 U. S. 319.

The bill should further be dismissed as to all of the defendants except the Western Securities Company upon the further ground as set forth in our original brief that the lawful par value of stock of Joint Stock Land Banks is restricted to five ($5.00) dollars per share. None of the defendants, except Western Securities Company, is claimed to have a sufficient number of shares at five ($5.00) dollars per share to be liable for three thousand ($3,000.00) dollars.

Section 674, Title 12, U. S. C. A. is applicable to Joint Stock Land Banks, and is made so expressly by *Section 811, Title 12, U. S. C. A. Section 674, Paragraph Third*

thereof, gives the power to Federal Land Banks, through their temporary directors, to make an organization certificate, which shall specifically state

> "the amount of capital stock and the number of shares into which the same is to be divided."

The organization certificate is thereby required to state only two things pertaining to capital stock, neither of which things is restricted to par value stock. *Sections 674 and 811* standing alone would give to Joint Stock Land Banks the power to issue stock either with or without par value.

Section 812, Title 12 U. S. C. A., imposing double liability, limits such liability to the *par value* of the stock. Certainly, Congress did not intend that Joint Stock Land Banks could issue stock without par value, which would avoid double liability. Therefore, we must look to the other Sections to find the restriction against the issuance by Joint Stock Land Banks of no par stock. The restricting Sections are *692 and 813. Section 813,* reading as follows

> "Except as otherwise provided, joint stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on Federal land banks by this chapter, so far as such restrictions and conditions are applicable,"

refers to *Section 692,* which latter section contains the restriction not only to par value stock but to five ($5.00) dollars per share. To construe *Section 813* as applying only to affairs of the corporation after organization is tantamount to saying that Joint Stock Land Banks could issue no par stock.

Respondents say we are estopped from making the contention that the limit of the liability of the shareholders is five ($5.00) dollars per share.

The attempted issue of par value in excess of five ($5.00) dollars per share, to-wit, one hundred ($100.00) dollars per share, is *ultra vires.*

See

Central Transportation Co. v. *Pullman,* 139 U. S. 24;
Marion v. *Sneeden,* 291 U. S. 262;
Texas & Pacific R. R. Co. v. *Potterf,* 291 U. S. 245;
Angelo-American Land v. *Lombard,* 132 Fed. 721;
Awoten v. *Atlas Exchange Nat'l Bank,* 295 U. S. 209.

Estoppel has no application where the transaction is truly *ultra vires.*

California Bank v. *Kennedy,* 167 U. S. 362;
McCormick v. *Market Bank,* 165 U. S. 537;
Central Transportation Co. v. *Pullman,* 139 U. S. 24.

The fact that the creditors purchased their bonds in reliance upon the fact that the shares had printed thereon "one hundred ($100.00) dollars per share par value" does not create an estoppel, inasmuch as they are conclusively charged with knowledge of the law that the par value is limited to five ($5.00) dollars per share.

McCormick v. *Market Bank,* 165 U. S. 538.

V.

The Bill Should be Dismissed as to the Defendant Executors or Administrators for Failure to Allege that the Claims were Presented for Allowance or Rejection in Accordance with the General Code of Ohio.

Respondents' reply to this is that respondents' cause of action against the creditors did not arise until after the four months' period expired within which to present their claims to the executors and administrators and to so construe the statute would render it unconstitutional as being in violation of the Fourteenth Amendment.

Section 10509-112 of the General Code provides:

> "Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or rejeet all claims, except contingent claims, within thirty days after their presentation. Any claim presented after the time herein provided shall not prevail as against bona fide purchasers or as against executors and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against bona fide distributees."

This Section fully satisfies the Fourteenth Amendment.

The argument of respondents that statutes of limitations are not binding but are controlling in actions of equity has no application. We are not seeking to enforce a statute of limitations. We are seeking a dismissal on the ground that the respondents did not allege that they complied with a condition precedent as defined by the Statutes of Ohio, to wit, the presentation of a claim within or without the four months' period before bringing their action.

Appellants properly raised the question in two ways:

1st. By specific Motion of Executors setting out specifically and definitely the failure to present (R. 55, 56); and

2nd. The Motion of other Executors (R. 55, 58) wherein Motions are made to dismiss on the ground the Bill does not state a cause of action against the particular defendants.

Conclusion.

We submit, therefore, that the decree of the Circuit Court of Appeals should be reversed. If the bill in equity should have been dismissed by the District Court of the United States upon any one of the grounds raised, the decree of the Circuit Court of Appeals would have been an affirmance.

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